FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 316

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Appellant,

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

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IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

(CONSOLIDATED CASES.)

S. F. No. 15724

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, A CORPORATION,

Plaintiff and Appellant,

vs.

CHARLES G. JOHNSON, AS TREASURER OF THE STATE OF CALIFORNIA.

Defendant and Respondent.

S. F. No. 15725

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, A CORPORATION,

Plaintiff and Appellant,

vs.

CHARLES G. JOHNSON, AS TREASURER OF THE STATE OF CALIFORNIA.

Defendant and Respondent.

SEPARATE STATEMENT AS TO JURISDICTION REQUIRED BY PARAGRAPH 1 OF RULE 12, AS AMENDED, OF THE SUPREME COURT OF THE UNITED STATES.

Considering itself aggrieved by the final judgments and decisions of the Supreme Court of California in the above

entitled causes, rendered on the 27th day of May, 1937 (opinion filed April 26, 1937; judgments final with filing of remittiturs, May 27, 1937), the appellant therein, a Connecticut corporation (hereinafter called Conn. General) hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond; and Conn. General submits this, its Separate Statement as to Jurisdiction Required by Paragraph 1 of Rule 12, as amended.

California Statute Involved.

The consolidated cases draw into question the validity of Article XIII, Section 14 (b) of the Constitution of California (there is no official citation thereto) as construed and applied by the State tax authorities (the Insurance Commissioner and the State Board of Equalization) in the taxation of Conn. General (a foreign corporation admitted to do business in California) and Conn. General's property, on the ground that so construed and applied this constitutional provision is repugnant to and in violation of the Fourteenth Amendment to the Constitution of the United States.

Article XIII, Section 14 (b) of the Constitution of California is as follows:

> "(b) Taxes on insurance companies. Every insurance company or association doing business in this state shall annually pay to the state a tax of one and one-half per cent (raised to 2.6% by the legislature under authority of a subsequent paragraph in Section 14—Conn. General's note.) upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state; provided, that there shall be deducted from said one and one-half per cent upon the gross premiums the amount of any county and municipal taxes paid by such companies on real estate owned by them in this

state. This tax shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property of such companies, except county and municipal taxes on real estate, and except as otherwise in this section provided; provided, that when by the laws of any other state or country, any taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligations or prohibitions, are imposed on insurance companies of this state, doing business in such other state or country, or upon their agents therein, in excess of such taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligations or prohibitions, imposed upon insurance companies of such other state or country, so long as such laws continue in force, the same obligations and prohibitions of whatsoever kind may be imposed by the legislature upon insurance companies of such other state or country doing business in this state." (Constitution of California, Treadwell, 1931, p. 776-777.)

Judgment or Decree Final.

The decision rendered by said Supreme Court of California was the final judgment or decree in the highest court of California in which a decision in the suit could be had; there was drawn in question the validity of Article XIII, Section 14 (b) of the Constitution of California, and the decision was in favor of the validity of this constitutional provision as construed and applied, as against the contention of Conn. General that the aforesaid constitutional provision is repugnant to and in violation of the Fourteenth Amendment to the Constitution of the United States.

Statutory Basis of Jurisdiction.

In accordance with the Rules of the Supreme Court of the United States, Conn. General respectfully shows this Court that the case is one in which, under the legislation in force when the act of January 31, 1928 (45 Stat. 54), was passed, to wit: under Sec. 237(a) of the Judicial Code, 28 U. S. C., Sec. 344(a), a review could be had in the Supreme

Court of the United States on a writ of error as a matter of right.

Conflict with Supreme Court Cases.

The jurisdiction of the Supreme Court of the United States attaches to this appeal by reason of the fact that, as construed and applied by the tax authorities of California and by the final decision of the Supreme Court of California, Conn. General is taxed by California on account of—

(1) Business not done in California,

(2) Contracts executed wholly and to be performed, and in fact performed wholly without the boundaries of California,

(3) A franchise not granted to Conn. General by California, and

(4) A privilege not exercised by Conn. General within that State;

as a result, the tax authorities of California have taken the property of Conn. General without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States:

St. Louis Cotton Compress Co. v. *Arkansas*, 260 U. S. 346;

Allgeyer v. *Louisiana*, 165 U. S. 578;

Compania General de Tabacos v. *Collector of Int. Revenue*, 275 U. S. 87;

Alaska Packers Assn. v. *Industrial Accident Commission*, 294 U. S. 532;

Provident Savings Life Soc. v. *Kentucky*, 239 U. S. 103.

The jurisdiction of the Supreme Court of the United States likewise attaches to this appeal by reason of the fact that as construed and applied by the tax authorities of California, and by the final decision of the Supreme Court of California, the property of Conn. General outside

the jurisdiction of California has been taxed for the benefit of California by the levy of a tax of 2.6% upon reinsurance considerations of Conn. General derived from business done wholly outside of the State of California; this purporting to be a tax authorized by law to be levied and collected solely on the property of Conn. General located within the State of California; and as a result, California's tax authorities have taxed property of Conn. General outside the jurisdiction of that State in violation of the Fourteenth Amendment to the Constitution of the United States:

Frick v. *Pennsylvania*, 268 U. S. 473;

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194.

This appeal involves solely taxes levied on account of business not done in California. Conn. General has paid without protest all taxes on account of business done in California.

Opinions Below.

Pursuant to the Rules of the Supreme Court of the United States, Conn. General has attached hereto, and hereby incorporates a copy of each of the following:

(a) The opinion of the Supreme Court of the State of California delivered and filed upon the rendering of the judgments hereby sought to be reviewed (Vol. 93 Cal. Dec. 4650, p. 399, 67 Pac. (2d) 675).

(b) The opinion of the Supreme Court of California delivered and filed upon the rendering of the judgments in earlier actions between the same parties, which involved the same constitutional provision as these causes, but concerned taxes paid in former years, 3 Cal. (2d) 83, 43 Pac. (2d) 278 (appeal of Conn. General to the Supreme Court of the United States was dismissed "for the want of a properly presented federal question", 296 U. S. 535).

Federal Questions Raised.

The Federal questions sought to be reviewed by the petition for appeal filed herewith were raised in each of the above entitled causes, in the first instance, by the amended complaints; in the court of first instance, the Superior Court of the State of California in and for the City and County of San Francisco. The Federal questions sought to be reviewed were presented to that Court during oral argument after appellee had interposed a general demurrer to the amended complaint in each of the above entitled causes. In each case the court of first instance sustained the general demurrer without leave to amend, and dismissed the amended complaints. On appeal, before the Supreme Court of the State of California, the Federal questions here sought to be reviewed were presented in the amended complaints, in the briefs of Conn. General and in the oral arguments of both parties before the Court. The Supreme Court of California affirmed the judgments of the Superior Court of California in and for the City and County of San Francisco and passed upon the Federal questions in the manner set forth in the opinion of the Supreme Court of California, a copy of which is attached hereto.

The allegations of Conn. General's amended complaint in No. 15724 (No. 15725 is identical except for dates and amounts) which present Federal questions and which have been held by the above mentioned courts of California not to state a cause of action, are as follows:

"XIV.

"That in assessing and levying taxes upon the property of plaintiff as authorized by subdivision (b) of Section 14 of Article XIII of the Constitution of California, the taxing authorities of said state, to-wit, the

State Board of Equalization, have adopted and followed a construction of said Section of said State Constitution, which results in a tax on plaintiff's property and franchise not located in said state and in violation of plaintiff's rights under the Fourteenth Amendment of the Constitution of the United States. Said State Board of Equalization in computing the tax upon said reinsurance considerations levied a tax on account of business not done in the State of California, and on contracts executed wholly and to be performed and in fact performed wholly without the boundaries of the State of California. If said Subdivision (b) of Section 14 of Article XIII of the Constitution of California is construed so as to tax plaintiff on the basis of the reinsurance considerations received as aforesaid, then this provision is invalid and invalid as to plaintiff as being in conflict with and in violation of the Constitution of the United States and particularly the Fourteenth Amendment thereof and that section of the Fourteenth Amendment prohibiting the taking of property without due process of law.

"XV.

"If Subdivision (b) of Section 14, Article XIII of the Constitution of California taxes plaintiff on the basis of its reinsurance business conducted as aforesaid, then it is invalid as to plaintiff as in conflict with the Fourteenth Amendment to the Constitution of the United States and particularly that section of the Fourteenth Amendment prohibiting the taking of property without due process of law in that a tax is levied against plaintiff on account of a franchise not granted to plaintiff by the State of California and a privilege not exercised by plaintiff within the State of California, plaintiff being authorized to conduct and conducting in the State of California only the business of life and accident and health insurance in accordance with the certificates of authority from the State of California as hereinbefore referred to.

"XVI.

"In levying the aforementioned tax against plaintiff based on the reinsurance considerations received by plaintiff outside of the State of California, the state denies to plaintiff the equal protection of its laws contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States in that plaintiff is required because of the peculiar type and distribution of its business to pay to defendant for the year 1930 a tax of $20,593.40 for the privilege of doing business in the State of California. This tax is measured by the business which plaintiff in fact did in the State of California during 1930, to-wit, the receipt by plaintiff of net premiums in the amount of $375,460.04, represents a tax in excess of 5.6% of said net premiums, the operation of such tax as to plaintiff being highly discriminatory and otherwise violative of its rights under the Fourteenth Amendment of the Constitution of the United States, other life insurance companies organized under state laws other than California and authorized to do business in the State of California but not accepting reinsurance being required to pay a tax equal to 2.6% of net premiums received on California business."

Date of Judgments.

The judgments sought to be reviewed were rendered by the Supreme Court of California on the 27th day of May, 1937, and the application for appeal (petition for appeal) is presented to the Chief Justice of the Supreme Court of the State of California on this 21st day of July, 1937.

Connecticut General files herewith a more complete assignment of errors as to said final decision of the Supreme Court of California.

RAYMOND BENJAMIN,
WILLIAM MARSHALL BULLITT,
HARTLEY F. PEART,
Attorneys for Connecticut General Life Insurance Company, Appellant.

EXHIBIT "A".

California Decisions.

S. F. No. 15724. In Bank. April 26, 1937.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY (a Corporation), *Plaintiff and Appellant,*

v.

CHARLES G. JOHNSON, as Treasurer of the State of California, *Defendant and Respondent.*

S. F. No. 15725. In Bank. April 26, 1937.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY (a Corporation), *Plaintiff and Appellant,*

v.

CHARLES G. JOHNSON, as Treasurer of the State of California, *Defendant and Respondent.*

[1] INSURANCE — TAXATION — REINSURANCE — CONSTITUTIONAL LAW—DUE PROCESS.—The business of reinsurance is but a modification of ordinary insurance and is included in a certificate authorizing an insurance company to carry on any of the general lines of insurance mentioned in section 594 of the Political Code; and in these actions to recover taxes assessed against plaintiff company, plaintiff could not legally claim that the certificates of authority issued to it to transact the business of life, accident and health insurance did not authorize it to do a reinsurance business in such classes of insurance, and that a computation of said taxes on the basis of reinsurance, therefore, constituted the taking of property without due process of law, for the reason that reinsurance was not specifically set forth in said section 594 as a class of insurance for which a certificate of authority could be issued in this state.

[2] ID.—DEMURRERS—PLEADING—REINSURANCE—CONCLUSIONS OF LAW.—In such actions, while the demurrers admitted all allegations of fact in the amended complaints,

they did not admit the truth of conclusions of law; and the allegations in the amended complaints as to the want of authority of the plaintiff to do a reinsurance business in this state came within such latter class of allegation, and was not admitted by the demurrers.

[3] Id. — Taxation — Reinsurance — Classification — Equal Protection—Constitutional Law.—In such actions, where it appeared that plaintiff was only required to pay a tax equal to 2.6 per cent of its gross premiums received from its entire business, which included its reinsurance business, and that all other companies accepting reinsurance business paid at the same rate, and that companies which did not accept reinsurance paid the same tax based upon the business transacted by them, it could not be said that plaintiff was denied the equal protection of the law or that a discrimination existed against it.

[4] Id. — Taxation — Reinsurance. — In such actions, where the plaintiff was authorized to do reinsurance business in this state during the entire time at which the tax against it was levied, the state officials in levying the tax for those years correctly deducted from the gross premiums of the companies reinsuring with the plaintiff, the premiums paid to plaintiff, and plaintiff was liable for the tax computed upon its entire business transacted during those years, including its reinsurance of risks to property situated in this state.

Appeals by plaintiff from judgments of the Superior Court of the City and County of San Francisco, Frank T. Deasy, Judge, in actions to recover taxes. *Affirmed.*

For Appellant—Raymond Benjamin, Hartley F. Peart.
For Respondent—U. S. Webb, Attorney-General; Neil Cunningham, Deputy Attorney-General; James J. Arditto.

These two actions, while appealed separately, have been argued together, and as they present the same identical question, they may and will be considered in one opinion. The only difference in the two actions, is that in action S. F. No. 15724, the plaintiff seeks to recover taxes paid

for the calendar year 1930, while in action S. F. No. 15725 recovery is sought for the year 1931. These actions differ in no material respect from the two actions bearing the same title and reported in 3 Cal. (2d) 83, except as to the years during which the taxes involved accrued. In our decision in those actions we held that the taxes paid by plaintiff which it sought to recover in those actions, were legally levied and collected and the plaintiff was not entitled to recover any portion of the taxes so paid by it. As to all the questions involved in those appeals which were discussed and decided therein, we adhere to the conclusions reached by us in that decision.

The present actions were pending at the time the former cases were decided. On the going down of the remittitur in the former appeals, the plaintiff amended its complaints in the two instant actions by expressly pleading the fourteenth amendment to the Constitution of the United States and alleging that the assessment and levy of a tax against plaintiff on the basis of its reinsurance business transacted during the two years covered by the complaints in these actions violated the provisions of this section of the federal Constitution.

There are set forth in said amended complaints, three grounds upon which the plaintiff relies in support of its contention that the assessment and levy of said tax against it violated the fourteenth amendment of the United States Constitution. These grounds are now relied upon by the plaintiff in support of its appeals herein.

It is first contended that the state board of equalization in computing the tax upon the reinsurance business of plaintiff levied a tax on account of business not done in the state of California and on contracts executed wholly and performed entirely without this state. This contention was the basis of the plaintiff's argument upon the former appeals, and it was decided adversely to plaintiff. We see no good reason for restating our position upon this question as our former decision fully answers the present contention of plaintiff.

[1] It is next contended that the computation of said tax upon the basis of reinsurance done by plaintiff is violative

of said constitutional section, and is the taking of plaintiff's property without due process of law in that said tax is levied against plaintiff on account of a transaction and privilege not granted to plaintiff by the state of California and not exercised by the plaintiff within this state. Plaintiff alleges that the plaintiff during the years for which said tax was levied held a legal and valid certificate of authority issued by the officials of this state authorizing it to do and transact the business of life and accident and health insurance within this state. It further alleges that neither of these certificates of authority authorized plaintiff to transact in California any other type of insurance except the three types above mentioned, all of which are recognized as types of insurance under section 594 of the Political Code of the state of California.

This section of the code was amended in 1933, and in 1935 the Insurance Code was adopted, which superseded section 594 of the Political Code classifying insurance business. As these amendments were subsequent to the years during which the taxes herein involved accrued, the present actions are governed by the provisions of section 594 of the Political Code prior to its amendment in 1933. Neither the amendment of 1933 nor the provisions of the Insurance Code change the law in any material respect, in so far as it applies to any point raised in these actions, from what it was prior to the year 1933. Section 594 of the Political Code provides for some twenty different classes of insurance for which certificates of authority may be issued in this state. No mention is made of reinsurance in said section as a separate class of insurance which may be carried on in this state. This does not mean that the business of reinsurance may not be carried on in this state. It may mean, however, that the business of reinsurance is included in the respective classes of insurance enumerated in said section of the code. That is to say, that a certificate of authority to engage in the business of fire insurance includes the authority to engage in the business of fire reinsurance.

"Reinsurance contracts as a general rule, involve no legal principles essentially different from those applicable

to contracts generally, nor does the contract necessarily differ in form from original insurance. And reinsurance was a valid contract at common law and * * * has generally been regarded as a legitimate and valid contract; reinsurance now being generally practiced." (Cyclopedia of Insurance Law, Couch, vol. 1, p. 65, sec. 44.) Again, the same author makes the following statement: "An insurance company empowered 'to make contracts of insurance' or 'al' kinds of insurance against losses by fire', may make a contract of reinsurance. * * *". Vol. 8, p. 7393, sec. 2258.) We find the identical statement in Joyce on Insurance, volume 1, page 345, section 115.

The case of *New York Bowery Fire Insurance Company* v. *The New York Fire Insurance Company of New York*, 17 Wendell (N. Y.) 359, seems to be the foundation for the above statement quoted above from the works of the two well-known authors. In that case we find the question discussed as follows: "It is objected that these companies had no authority under their charters of incorporation to enter into the contract of re-assurance. By the 6th section of the Act incorporating the plaintiffs, Laws of 1832, p. 292, they have power 'to make contracts of insurance against loss by fire of any houses or buildings whatsoever, and of any goods, chattels or personal estate whatsoever'. By the 6th section of the Act incorporating the Bowery Co. Laws of 1833, p. 296, they have power 'to make all kinds of insurance against losses by fire, of any houses and buildings whatsoever; and also upon all goods, wares and merchandise whatsoever'. Re-assurance is but a modification of the contract of insurance, and is, I think, clearly included in the power of the plaintiffs, 'to make contracts of insurance', and of the defendants 'to make all kinds of insurance' against losses by fire. * * *"

Section 594 of the Political Code enumerates all the different classes of insurance authorized to be transacted in this state. It does not mention reinsurance. If reinsurance business is not included within one or more of the different classes of insurance mentioned in this code section, then there is no law in this state governing that class of insurance, and it might follow that that type of insurance busi-

ness is not permitted in this state. In the adoption of the Insurance Code in 1935, the insurance law of the state was rewritten, and in many instances material changes were made therein. Yet in this latest legislative enactment on the subject, we find no mention made of reinsurance as a separate and distinct type from ordinary insurance although other references are made therein to the business of reinsurance. In fact, the Insurance Code follows verbatim the classification of the different classes of insurance enumerated in section 594, Political Code, prior to its repeal. It is hardly reasonable that the commission which framed the Insurance Code, and the legislature which enacted the bill proposed by the commission into law, as well as section 594, Political Code, and its amendment, intended to leave the business of reinsurance without regulation in this state. The only reasonable conclusion to be drawn from their actions, as well as from the authorities cited above, is that the business of reinsurance is but a modification of ordinary insurance and is included in a certificate authorizing an insurance company to carry on any of the general lines of insurance mentioned in the statute. The plaintiff, therefore, cannot legally claim that during the times mentioned in the amended complaints in these actions, the certificates of authority issued to it to transact the business of life, accident and health insurance, did not authorize it to do a reinsurance business in these three classes of insurance.

[2] It is true that plaintiff has alleged that it had no certificate of authority to transact reinsurance business in this state. While the demurrers admit all allegations of fact in the amended complaints, they do not admit the truth of conclusions of law. The allegation as to the want of authority of the plaintiff to do a reinsurance business in this state comes within this latter class of allegations and is not admitted by demurrer. The section of the Constitution of this state under which the tax was levied against the plaintiff is not therefore violative of the provisions of the fourteenth amendment of the federal Constitution which prohibits the taking of property without due process of law in that it permits the levying of a tax against

plaintiff on account of a franchise not granted to plaintiff or exercised by it in this state. As we have seen, plaintiff has enjoyed and exercised this franchise during the entire time involved in these actions.

[3] Plaintiff further claims that this section of the federal Constitution is violated in that the tax officials of this state in computing the tax against the plaintiff, included its reinsurance business, and thereby denied to plaintiff the equal protection of the law. Plaintiff bases this claim upon its statement that under the law in force during the years mentioned, the rate of taxation against all persons and companies doing an insurance business was fixed at 2.6 per cent of their gross premiums, and that by compelling plaintiff to pay a tax of 2.6 per cent based upon gross premiums received by it, not only from its general insurance business but also upon its reinsurance business, such tax amounted to more than 5.6 per cent of its gross premiums received from its general insurance business. Therefore, plaintiff claims that other insurance companies which transact business in this state but do not accept reinsurance business are only required to pay a tax equal to 2.6 per cent of their gross premiums while plaintiff is required to pay a tax equal to 5.6 per cent of its gross premiums. To state this proposition is to show its fallacy. Plaintiff is only required to pay a tax equal to 2.6 per cent of its gross premiums received from its entire business which, of course, includes its reinsurance business. All other companies accepting reinsurance business pay at the at the same rate, and companies which do not accept reinsurance pay the same tax based upon the business transacted by them. There is, therefore, no discrimination against the plaintiff as it is taxed at the same rate at which others engaged in a similar business are taxed.

[4] Article XIII, section 14 (b) of the Constitution of this state permits a deduction of reinsurance premiums from the amount of the gross premiums received by an insurance company doing business in this state, for the purpose of computing the amount of taxes to be paid by said company. The evident purpose and intent of this provision of the Constitution are to avoid double taxation with-

out any loss of revenue to the state. This deduction can only be made when the company which reinsures is "authorized to do business in this state." We have shown that the plaintiff was during the years herein involved, authorized to do not only a life, accident and health insurance business, but a reinsurance business in this state. Plaintiff's business in reinsurance clearly came within the terms of the constitutional section which permitted a deduction from gross premiums of premiums paid for reinsurance. Plaintiff undoubtedly received a benefit from this deduction as the companies whose risks it has reinsured, being relieved of taxes to the extent of the business transacted with plaintiff, could pay to plaintiff a higher premium than they could have paid had this deduction not been made. On the other hand, if it should be held that plaintiff is not liable for this tax, then no deduction should be made to the companies with which the plaintiff is doing a reinsurance business, with the result that these companies would not be able to pay to the plaintiff the rates which it is now receiving. In such a case, it would be necessary for the plaintiff either to refuse this business or to reduce its premiums if it expected to hold this reinsurance business. We, however, are of the opinion that, as the plaintiff was authorized to do reinsurance business in this state during the entire time at which the tax against it was levied, the state officials in levying the tax for those years correctly deducted from the gross premiums of the companies reinsuring with the plaintiff, the premiums paid to plaintiff, and that the plaintiff was liable for the tax computed upon its entire business transacted during those years, including its reinsurance of risks to property situated in this state.

The judgments are affirmed.

CURTIS, *J.*

We concur:

EDMONDS, *J.*
SHENK, *J.*
THOMPSON, *J.*
LANGDON, *J.*

EXHIBIT "B".

California Decisions.

S. F. No. 14732. In Bank. April 2, 1935.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY (a Corporation), *Plaintiff and Appellant*,

v.

CHARLES G. JOHNSON, as Treasurer of the State of California, *Defendant and Respondent.*

S. F. No. 14733. In Bank. April 2, 1935.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY (a Corporation), *Plaintiff and Appellant*,

v.

CHARLES G. JOHNSON, as Treasurer of the State of California, *Defendant and Respondent.*

[1] TAXATION—FOREIGN INSURANCE CORPORATIONS—REINSURANCE—CONSTITUTIONAL LAW.—In these actions by a foreign insurance corporation to recover alleged overpayments of taxes levied on account of reinsurance premiums received by plaintiff in another state in respect to the reinsurance of other foreign companies which had issued policies in this state, in view of the intent to tax all gross premiums, as shown by section 14 (b) of article XIII of the Constitution, plaintiff was estopped to deny that the reinsurance was consummated in this state unless and until it could show that the original insurer had paid the full tax on gross premiums without exemption, including the claims of the state, if any, for retaliatory taxes; and where there was no such showing plaintiff was not entitled to recover the alleged overpayments.

Appeal by plaintiff from judgments of the Superior Court of the City and County of San Francisco, Franklin A. Griffin, Judge, in actions to recover alleged overpayments of taxes. *Affirmed.*

For Appellant—Raymond Benjamin, Hartley F. Peart.
For Respondent—U. S. Webb, Attorney-General; Neil Cunningham,

This cause is styled a consolidated action by plaintiff, a life insurance corporation, organized under the laws of the state of Connecticut, to recover from the state of California, through the treasurer thereof, certain sums alleged to be overpayments of taxes, made involuntarily under article XIII, section 14 (b) of the California Constitution, which states the rate base for the calculation of such taxes to be the total gross premiums received by the corporation during the period involved from insurance business done in this state. Defendant's demurrer to the complaint in each case was sustained without leave to amend and judgment passed for him. Plaintiff appealed.

The controversy arises over the propriety of the state's action in including within the tax base certain payments made without the state by original insurers to plaintiff at its home office, for reinsurance respecting risks assumed and policies issued and delivered in California. The case brings to the foreground the proper interpretation of the above mentioned section of the Constitution, which, so far as here material, reads:

"Every insurance company or association doing business in this state shall annually pay to the state a tax of • • • per cent upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state; provided, that there shall be deducted from said • • • per cent upon the gross premiums the amount of any county and municipal taxes paid by such companies on real estate owned by them in this state. This tax shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property of such companies, except county and municipal taxes on real estate, and except as otherwise in this section provided; provided, that when by the laws of any other state or country, any taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligations or prohibitions, are imposed on insurance companies of this state,

doing business in such other state or country, or upon their agents therein, in excess of such taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligations or prohibitions, imposed upon insurance companies of such other state or country, so long as such laws continue in force, the same obligations and prohibitions of whatsoever kind may be imposed by the legislature upon insurance companies of such other state or country doing business in this state."

[1] Appellant states the question involved as follows: "Is the money paid to plaintiff in Connecticut, under an agreement made in Connecticut, for indemnifying another insurance company organized under state laws other than California as against possible loss by that other insurance company under some insurance policy it has written and issued in California, taxable against plaintiff under this provision of the Constitution as 'gross premiums received upon its business done in this state'?"

The facts alleged in one of the complaints (the other being identical save as to the year involved) show plaintiff to be a life insurance corporation regularly organized under the laws of the state of Connecticut, with home office at Hartford, and duly authorized at all times herein to transact business in California. That during the year 1927 plaintiff, acting pursuant to agreements made in 1926 without the state of California, with certain other foreign insurance companies, did, by covenants executed wholly without the state of California, indemnify said insurers against possible loss in part upon insurance risks secured, written and issued in California and for payment therefor received at its home office certain sums commonly styled "reinsurance payments". That for these payments plaintiff issued no policies of insurance to the insurer companies nor to the policyholders and that, respecting said reinsurance, it performed no act of any kind and transacted no business of any kind in the state of California. That the insurance commissioner of California in 1928, and for the year ending December 31, 1927, required plaintiff to report all such sums received by it for such reinsurance. That such sums so reported for said year were, in the aggregate, $398,806, and

they were then added to the other items going to make up the total gross premiums for said year, making a grand total of $684,393.85, upon which the tax of 2.6 per cent. was computed, the amounts so added thus increasing the amount of the tax $10,316.98 over what it would otherwise have been. The latter sum was paid under protest and a prayer for its return, with interest, was made herein by plaintiff.

Our problem, as already intimated, is to determine whether the words "gross premiums received upon its business done in this state", include sums collected by one authorized company from another for reinsurance of risks in California where such contract is executed and carried into effect wholly without the state and substantially in the manner above set out.

A distinction, of course, exists between a contract of insurance and a contract of reinsurance. Our Civil Code has defined the nature of the contract of reinsurance as follows: "A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability of such original insurance (sec. 2646, Civil Code)."

"A reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage." (Sec. 2648, Civ. Code.)

"The original insured has no interest in a contract of reinsurance." (Sec. 2649, Civ. Code.)

"The ordinary contract of reinsurance operates solely between reinsured and the reinsurer, and creates no privity whatever between the reinsurer and the person originally insured. The contract of insurance and that of reinsurance remain totally distinct and unconnected, and the reinsurer is in no respect liable, either as surety or otherwise, to reinsured's policy holders; * * *" (33 Cor. Jur., sec. 735, p. 57).

It is clear also that ordinarily a reinsurance transaction is doing business in the state where such contract is consummated and this may or may not be in the state where the original risk was assumed. The authorities confirm this conclusion.

"Reinsurance involves no transaction or privity between the reinsurer and those originally assured. The lower

courts rightly held that the making of the reinsurance compacts in New York between respondent and insurers of property in Mississippi was not the doing of business in that state." (*Morris & Co.* v. *Skandinavia Insurance Co.*, 279 U. S. 405, 408.)

In the case of *State* v. *Continental Ins. Co.*, (Ind.) 116 N. E. 929, it appeared from the special finding that the reinsurance involved was transacted at the city of Chicago, Illinois. Holding that under the terms of the statute there involved, the insurance company was not required to pay taxes to the state of Indiana on said reinsurance premiums, the court said: "Under the terms of the statute, it was the duty of the company to pay taxes to the state of Indiana on reinsurance premiums received from other companies on account of risks located in Indiana? * * * As we construe said section 10216, the legislative intent expresed therein is that the tax shall be imposed only on business done within the territorial boundaries of the state of Indiana. The license is upon the business, and the tax is laid on 'every insurance company not organized under the laws of this state, and doing business therein.' Where a foreign company takes over from another foreign company, for the purpose of reinsurance, risks on property in this state, the transaction is, of course, between the companies, and the insurer would not be subject to the tax on the reinsurance premium received if the business was not done in this state. And this would be so whether the companies were licensed to do business in this state or not."

The supreme court of Iowa arrived at the same conclusion in the case of *In re Continental Casualty Co.* [Iowa], 179 N. W., pp. 185-188, a case involving taxation of "gross premiums" on "business done in this state" when the right of the state to tax "reinsurance premiums" was presented. The court there said: "It is conceded that the contract of indemnity or reinsurance in question was entered into between these companies in New York, the state of their domicile, and that all the distribution of business and the pro rating of premiums pursuant thereto was done in such state. Clearly, therefore, the business was not done in Iowa." (See, also, *Swing* v. *Taylor*, [W. Va.] 70 S. E. 373.)

But the foregoing observations do not compel a reversal of the judgments here nor is such result compelled by the further fact that certain language employed in said provision may be accorded a broader meaning than that which it had when a part of previously existing statutes of the state.

Respondent justifies the ruling of the court below by its interpretation of the section, particularly the language: "less * * * reinsurance in companies or associations authorized to do business in this state", as follows: The provision, when read as a whole, is now applicable to insurance companies of all types, domestic as well as foreign. Each company must, under section 596 of the Political Code, procure a certificate of authority to transact business in the state. The language, when fairly construed, requires each company of every type to pay a like percentage of its gross premiums collected on policies issued and delivered upon risks assumed in the state; reinsurance premiums received by a domestic corporation must of necessity be returned and a percentage thereof paid to the state. No insurer can claim an exemption upon reinsurance premiums paid to an unauthorized company. Therefore, to prevent unjust discrimination, the state may not allow the exemption for reinsurance paid to an authorized company unless and until it is in a position to claim its uniform percentage of such reinsurance premiums so as to give it in the aggregate the equivalent of the percentage on the original gross premiums paid to the insurer. In short, the transaction is not between "authorized" companies unless this result follows. Further, any other construction of the section would not only be unjust discrimination against the domestic companies but would enable foreign companies, by a simple process of reinsurance outside the state, to escape altogether such tax exaction.

We think this argument of respondent is sound and unanswerable. The intent to tax all gross premiums, or their equivalent, must be present or else the whole scheme is discriminatory and unworkable. Appellant is charged with knowledge that the state is entitled to said percentage, or to its equivalent, and also with the further knowledge that the

state has this right above and in addition to any additional claims it may have under the so-called "retaliatory" rights conferred by said section. Appellant, therefore, in order to state a cause of action for a refund must of necessity show that these rights of the state have been fully satisfied. This is but another way of saying that appellant is estopped to deny that said reinsurance was consummated in the state unless and until it can show that the insurer has paid the full tax on gross premiums without exemption, including claims of the state, if any, for retaliatory taxes. This showing appellant failed to make.

That the term "reinsurance" premiums is included in the term "gross" premiums is clear, not only because of the nature of the insurance contract but also from the context of the provision, especially that portion thereof which allows, under certain conditions, a deduction of such payments from "gross premiums" received, thereby implying their previous inclusion therein.

For the foregoing reasons the complaints fail to state a cause of action.

The judgments are affirmed.

PRESTON, *J.*

We concur:

THOMPSON, *J.*
CURTIS, *J.*
WASTE, *C. J.*
SHENK, *J.*
LANGDON, *J.*